

OCA FILE *leg*

4 February 1988
OCA88-0353

MEMORANDUM FOR: Director, Office of Security
C/AL&MSD/OGC
C/ICAD/OGC

FROM: Legislation Division
Office of Congressional Affairs

STAT

SUBJECT: Polygraph Legislation: Senate Labor & Human
Resources Committee Markup of S. 1904

1. On 3 February 1988, the Senate Labor and Human Resources Committee "marked up" S. 1904, the "Polygraph Protection Act of 1987".

2. The following Committee members were present at the markup: Chairman Kennedy, Ranking Minority Member Hatch; Senators Matsunaga, Harkin, Adams, Metzenbaum, Dodd, Mikulski and Cochran.

3. Chairman Kennedy began by announcing that before the Committee was an amendment to the bill in the nature of a substitute sponsored by himself and Senator Hatch. After brief remarks by both sponsors, a vote was requested. With no further discussion or debate, the amendment was adopted by a vote of twelve to three (Senators Cochran, Quayle, and Thurmond - the latter two by proxy). The bill as so amended was then ordered to be reported favorably to the full Senate.

4. A copy of the amendment is attached for your information. It does not appear to differ substantially from S. 1904 as introduced. The Agency's exemptions, as contained in S. 1904, remain unchanged.

5. The Committee report on the bill is expected to be ready in the near future with floor action to be scheduled thereafter.

6. Senators Thurmond and Quayle, and perhaps others, are expected to oppose the bill on the floor. The final Administration position on the bill still has yet to be

determined. The Department of Justice opposes the bill for reasons of federalism and the Department of Labor supports it because of labor concerns. Accordingly, although Justice has said it will recommend a veto should the bill pass, it is not clear this recommendation will influence the floor debate or be conclusive insofar as the Presidential action is concerned.

7. We will keep you advised of developments concerning this legislation.

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Attachment

OCA/Leg, [redacted] (4 February 1988)

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AMENDMENT NO. _____

Calendar No. _____

Purpose: To make a substitute amendment.

IN THE SENATE OF THE UNITED STATES—100th Cong., 2d Sess.

S. 1904

To strictly limit the use of lie detector examinations by employers involved in or affecting interstate commerce.

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed -

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be
proposed by Mr. KENNEDY (for himself and Mr. HATCH)

Viz:

1 Strike out all after the enacting clause and insert in
2 lieu thereof the following:

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the "Polygraph Protection
5 Act of 1987".

6 SEC. 2. DEFINITIONS.

7 As used in this Act:

8 (1) COMMERCE.—The term "commerce" has
9 the meaning provided by section 3(b) of the Fair
10 Labor Standards Act of 1938 (29 U.S.C. 203(b)).

1 (2) EMPLOYER.—The term “employer” includes
2 any person acting directly or indirectly in the interest
3 of an employer in relation to an employee or pro-
4 spective employee.

5 (3) LIE DETECTOR TEST.—The term “lie detec-
6 tor test” includes—

7 (A) any examination involving the use of
8 any polygraph, deceptograph, voice stress ana-
9 lyzer, psychological stress evaluator, or any
10 other similar device (whether mechanical, elec-
11 trical, or chemical) that is used, or the results of
12 which are used, for the purpose of rendering a
13 diagnostic opinion regarding the honesty or dis-
14 honesty of an individual; and

15 (B) the testing phases described in para-
16 graphs (1), (2), and (3) of section 8(c).

17 (4) POLYGRAPH.—The term “polygraph” means
18 an instrument that records continuously, visually,
19 permanently, and simultaneously changes in the car-
20 diovascular, respiratory, and electrodermal patterns
21 as minimum instrumentation standards.

22 (5) RELEVANT QUESTION.—The term “relevant
23 question” means any lie detector test question that
24 pertains directly to the matter under investigation
25 with respect to which the examinee is being tested.

1 (6) SECRETARY.—The term “Secretary” means
2 the Secretary of Labor.

3 (7) TECHNICAL QUESTION.—The term “technical
4 question” means any control, symptomatic, or neu-
5 tral question that, although not relevant, is designed
6 to be used as a measure against which relevant re-
7 sponses may be measured.

8 SEC. 3. PROHIBITIONS ON LIE DETECTOR USE.

9 Except as provided in section 7, it shall be unlawful
10 for any employer engaged in or affecting commerce or in
11 the production of goods for commerce—

12 (1) directly or indirectly, to require, request,
13 suggest, or cause any employee or prospective em-
14 ployee to take or submit to any lie detector test;

15 (2) to use, accept, refer to, or inquire concern-
16 ing the results of any lie detector test of any employ-
17 ee or prospective employee;

18 (3) to discharge, dismiss, discipline in any
19 manner, or deny employment or promotion to, or
20 threaten to take any such action against—

21 (A) any employee or prospective employee
22 who refuses, declines, or fails to take or submit
23 to any lie detector test; or

1 (B) any employee or prospective employee
2 on the basis of the results of any lie detector
3 test; or

4 (4) to discharge, discipline, or in any manner
5 discriminate against an employee or prospective em-
6 ployee because—

7 (A) such employee or prospective employ-
8 ee has filed any complaint or instituted or
9 caused to be instituted any proceeding under or
10 related to this Act;

11 (B) such employee or prospective employ-
12 ee has testified or is about to testify in any such
13 proceeding; or

14 (C) of the exercise by such employee, on
15 behalf of such employee or another person, of
16 any right afforded by this Act.

17 SEC. 4. NOTICE OF PROTECTION.

18 The Secretary shall prepare, have printed, and distrib-
19 ute a notice setting forth excerpts from, or summaries of,
20 the pertinent provisions of this Act. Each employer shall
21 post and maintain such notice, in conspicuous places on its
22 premises where notices to employees and applicants to em-
23 ployment are customarily posted.

24 SEC. 5. AUTHORITY OF THE SECRETARY.

25 (a) IN GENERAL.—The Secretary shall—

1 (1) issue such rules and regulations as may be
2 necessary or appropriate to carry out this Act;

3 (2) cooperate with regional, State, local, and
4 other agencies, and cooperate with and furnish tech-
5 nical assistance to employers, labor organizations,
6 and employment agencies to aid in effectuating the
7 purposes of this Act; and

8 (3) make investigations and inspections and re-
9 quire the keeping of records necessary or appropriate
10 for the administration of this Act.

11 (b) SUBPOENA AUTHORITY.—For the purpose of any
12 hearing or investigation under this Act, the Secretary shall
13 have the authority contained in sections 9 and 10 of the
14 Federal Trade Commission Act (15 U.S.C. 49 and 50).

15 SEC. 6. ENFORCEMENT PROVISIONS.

16 (a) CIVIL PENALTIES.—

17 (1) IN GENERAL.—Subject to paragraph (2)—

18 (A) any employer who violates section 4
19 may be assessed a civil money penalty not to
20 exceed \$100 for each day of the violation; and

21 (B) any employer who violates any other
22 provision of this Act may be assessed a civil
23 penalty of not more than \$10,000.

24 (2) DETERMINATION OF AMOUNT.—In determin-
25 ing the amount of any penalty under paragraph (1),

1 the Secretary shall take into account the previous
2 record of the person in terms of compliance with this
3 Act and the gravity of the violation.

4 (3) COLLECTION.—Any civil penalty assessed
5 under this subsection shall be collected in the same
6 manner as is required by subsections (b) through (e)
7 of section 503 of the Migrant and Seasonal Agricul-
8 tural Worker Protection Act (29 U.S.C. 1853) with
9 respect to civil penalties assessed under subsection
10 (a) of such section.

11 (b) INJUNCTIVE ACTIONS BY THE SECRETARY.—The
12 Secretary may bring an action to restrain violations of this
13 Act. The district courts of the United States shall have ju-
14 risdiction, for cause shown, to issue temporary or perma-
15 nent restraining orders and injunctions to require compli-
16 ance with this Act.

17 (c) PRIVATE CIVIL ACTIONS.—

18 (1) LIABILITY.—An employer who violates this
19 Act shall be liable to the employee or prospective
20 employee affected by such violation. Such employer
21 shall be liable for such legal or equitable relief as
22 may be appropriate, including but not limited to em-
23 ployment, reinstatement, promotion, and the payment
24 of lost wages and benefits.

1 (2) COURT.—An action to recover the liability
2 prescribed in paragraph (1) may be maintained
3 against the employer in any Federal or State court of
4 competent jurisdiction by any one or more employ-
5 ees for or in behalf of himself or themselves and
6 other employees similarly situated.

7 (3) COSTS.—The court, in its discretion, may
8 allow the prevailing party, other than the United
9 States, a reasonable attorney's fee as part of the
10 costs.

11 (d) WAIVER OF RIGHTS PROHIBITED.—The rights and
12 procedures provided by this Act may not be waived by
13 contract or otherwise, unless such waiver is part of a writ-
14 ten settlement of a pending action or complaint, agreed to
15 and signed by all the parties.

16 SEC. 7. EXEMPTIONS.

17 (a) NO APPLICATION TO GOVERNMENTAL EMPLOY-
18 ERS.—The provisions of this Act shall not apply with re-
19 spect to the United States Government, a State or local
20 government, or any political subdivision of a State or local
21 government.

22 (b) NATIONAL DEFENSE AND SECURITY EXEMPTION.—

23 (1) NATIONAL DEFENSE.—Nothing in this Act
24 shall be construed to prohibit the administration, in

1 the performance of any counterintelligence function,
2 of any lie detector test to—

3 (A) any expert or consultant under contract
4 to the Department of Defense or any employee
5 of any contractor of such Department; or

6 (B) any expert or consultant under contract
7 with the Department of Energy in connection
8 with the atomic energy defense activities of
9 such Department or any employee of any con-
10 tractor of such Department in connection with
11 such activities.

12 (2) SECURITY.—Nothing in this Act shall be
13 construed to prohibit the administration, in the per-
14 formance of any intelligence or counterintelligence
15 function, of any lie detector test to—

16 (A)(i) any individual employed by, or as-
17 signed or detailed to, the National Security
18 Agency or the Central Intelligence Agency, (ii)
19 any expert or consultant under contract to the
20 National Security Agency or the Central Intelli-
21 gence Agency, (iii) any employee of a contrac-
22 tor of the National Security Agency or the Cen-
23 tral Intelligence Agency, or (iv) any individual
24 applying for a position in the National Security
25 Agency or the Central Intelligence Agency; or

1 (B) any individual assigned to a space
2 where sensitive cryptologic information is pro-
3 duced, processed, or stored for the National Se-
4 curity Agency or the Central Intelligence
5 Agency.

6 (c) EXEMPTION FOR FBI CONTRACTORS.—Nothing in
7 this Act shall be construed to prohibit the administration,
8 in the performance of any counterintelligence function, of
9 any lie detector test to an employee of a contractor of the
10 Federal Bureau of Investigation of the Department of Jus-
11 tice who is engaged in the performance of any work under
12 the contract with such Bureau.

13 (d) LIMITED EXEMPTION FOR ONGOING INVESTIGA-
14 TIONS.—Subject to section 8, this Act shall not prohibit an
15 employer from requesting an employee to submit to a
16 polygraph test if—

17 (1) the test is administered in connection with
18 an ongoing investigation involving economic loss or
19 injury to the employer's business, including theft,
20 embezzlement, misappropriation, or an act of unlaw-
21 ful industrial espionage or sabotage;

22 (2) the employee had access to the property that
23 is the subject of the investigation;

1 (3) the employer has a reasonable suspicion that
2 the employee was involved in the incident or activity
3 under investigation; and

4 (4) the employer—

5 (A) files a report of the incident or activity
6 with the appropriate law enforcement agency;

7 (B) files a claim with respect to the inci-
8 dent or activity with the insurer of the employ-
9 er, except that this subparagraph shall not apply
10 to a self-insured employer;

11 (C) files a report of the incident or activity
12 with the appropriate government regulatory
13 agency; or

14 (D) executes a statement that—

15 (i) sets forth with particularity the spe-
16 cific incident or activity being investigated
17 and the basis for testing particular em-
18 ployees:

19 (ii) is signed by a person (other than a
20 polygraph examiner) authorized to legally
21 bind the employer;

22 (iii) is provided to the employee on
23 request;

24 (iv) is retained by the employer for at
25 least 3 years; and

(v) contains at a minimum—

(I) an identification of the specific economic loss or injury to the business of the employer;

(II) a statement indicating that the employee had access to the property that is the subject of the investigation; and

(III) a statement describing the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.

SEC. 8. RESTRICTIONS ON USE OF EXEMPTIONS.

(a) OBLIGATION TO COMPLY WITH CERTAIN LAWS AND AGREEMENTS.—The limited exemption provided under section 7(d) shall not diminish an employer's obligation to comply with—

(1) applicable State and local law; and
(2) any negotiated collective bargaining agreement,

that limits or prohibits the use of lie detector tests on employees.

(b) TEST AS BASIS FOR ADVERSE EMPLOYMENT ACTION.—Such exemption shall not apply if an employee

1 is discharged, dismissed, disciplined, or discriminated
2 against in any manner on the basis of the analysis of one or
3 more polygraph tests or the refusal to take a polygraph
4 test, without additional supporting evidence. The evidence
5 required by section 7(d) may serve as additional support-
6 ing evidence.

7 (c) RIGHTS OF EXAMINEE.—Such exemption shall not
8 apply unless the requirements described in section 7 and
9 paragraphs (1), (2), and (3) are met.

10 (1) PRETEST PHASE.—During the pretest phase,
11 the prospective examinee—

12 (A) is provided with reasonable notice of
13 the date, time, and location of the test, and of
14 such examinee's right to obtain and consult
15 with legal counsel or an employee representa-
16 tive before each phase of the test;

17 (B) is not subjected to harassing interroga-
18 tion technique;

19 (C) is informed of the nature and charac-
20 teristics of the tests and of the instruments in-
21 volved;

22 (D) is informed—

23 (i) whether the testing area contains a
24 two-way mirror, a camera, or any other

1 device through which the test can be ob-
2 served;

3 (ii) whether any other device, includ-
4 ing any device for recording or monitoring
5 the conversation will be used; or

6 (iii) that the employer and the examin-
7 ee, may with mutual knowledge, make a
8 recording of the entire proceeding;

9 (E) is read and signs a written notice in-
10 forming such examinee—

11 (i) that the examinee cannot be re-
12 quired to take the test as a condition of
13 employment;

14 (ii) that any statement made during
15 the test may constitute additional support-
16 ing evidence for the purposes of an adverse
17 employment action described in section
18 8(b);

19 (iii) of the limitations imposed under
20 this section;

21 (iv) of the legal rights and remedies
22 available to the examinee if the polygraph
23 test is not conducted in accordance with
24 this Act; and

1 (v) of the legal rights and remedies of
2 the employer; and

3 (F) is provided an opportunity to review all
4 questions (technical or relevant) to be asked
5 during the test and is informed of the right to
6 terminate the test at any time; and

7 (G) signs a notice informing such examin-
8 ee of—

9 (i) the limitations imposed under this
10 section;

11 (ii) the legal rights and remedies
12 available to the examinee if the polygraph
13 test is not conducted in accordance with
14 this Act; and

15 (iii) the legal rights and remedies of
16 the employer.

17 (2) ACTUAL TESTING PHASE.—During the actual
18 testing phase—

19 (A) the examinee is not asked any ques-
20 tions by the examiner concerning—

21 (i) religious beliefs or affiliations;

22 (ii) beliefs or opinions regarding racial
23 matters;

24 (iii) political beliefs or affiliations;

1 (iv) any matter relating to sexual be-
2 havior; and

3 (v) beliefs, affiliations, or opinions re-
4 garding unions or labor organizations;

5 (B) the examinee is permitted to terminate
6 the test at any time;

7 (C) the examiner does not ask such exam-
8 inee any question (technical or relevant) during
9 the test that was not presented in writing for
10 review to such examinee before the test;

11 (D) the examiner does not ask technical
12 questions of the examinee in a manner that is
13 designed to degrade, or needlessly intrude on,
14 the examinee;

15 (E) the examiner does not conduct a test on
16 an examinee when there is written evidence by
17 a physician that the examinee is suffering from
18 a medical or psychological condition or under-
19 going treatment that might cause abnormal re-
20 sponses during the test; and

21 (F) the examiner does not conduct and
22 complete more than five polygraph tests on a
23 calendar day on which the test is given, and
24 does not conduct any such test for less than a
25 90-minute duration.

1 (3) POST-TEST PHASE.—Before any adverse em-
2 ployment action, the employer must—

3 (A) further interview the examinee on the
4 basis of the results of the test; and

5 (B) provide the examinee with—

6 (i) a written copy of any opinion or
7 conclusion rendered as a result of the test;
8 and

9 (ii) a copy of the questions asked
10 during the test along with the correspond-
11 ing charted responses.

12 (d) QUALIFICATIONS OF EXAMINER.—Such exemptions
13 shall not apply unless the individual who conducts the
14 polygraph test—

15 (1) is at least 21 years of age;

16 (2) has complied with all required laws and reg-
17 ulations established by licensing and regulatory au-
18 thorities in the State in which the test is to be con-
19 ducted;

20 (3)(A) has successfully completed a formal
21 training course regarding the use of polygraph tests
22 that has been approved by the State in which the test
23 is to be conducted or by the Secretary; and

24 (B) has completed a polygraph test internship of
25 not less than 6 months duration under the direct su-

1 pervision of an examiner who has met the require-
2 ments of this section;

3 (4) maintains a minimum of a \$50,000 bond or
4 an equivalent amount of professional liability cover-
5 age;

6 (5) uses an instrument that records continuously,
7 visually, permanently, and simultaneously changes in
8 the cardiovascular, respiratory, and electrodermal
9 patterns as minimum instrumentation standards;

10 (6) bases an opinion of deception indicated on
11 evaluation of changes in physiological activity or re-
12 activity in the cardiovascular, respiratory, and elec-
13 trodermal patterns on the lie detector charts;

14 (7) renders any opinion or conclusion regarding
15 the test—

16 (A) in writing and solely on the basis of an
17 analysis of the polygraph charts;

18 (B) that does not contain information other
19 than admissions, information, case facts, and in-
20 terpretation of the charts relevant to the purpose
21 and stated objectives of the test; and

22 (C) that does not include any recommenda-
23 tion concerning the employment of the examin-
24 ee; and

1 (8) maintains all opinions, reports, charts, writ-
2 ten questions, lists, and other records relating to the
3 test for a minimum period of 3 years after adminis-
4 tration of the test.

5 (e) PROMULGATION OF STANDARDS.—The Secretary
6 shall establish standards governing individuals who, as of
7 the date of the enactment of this Act, are qualified to con-
8 duct polygraph tests in accordance with applicable State
9 law. Such standards shall not be satisfied merely because
10 an individual has conducted a specific number of poly-
11 graph tests previously.

12 SEC. 9. DISCLOSURE OF INFORMATION.

13 (a) IN GENERAL.—A person, other than the examinee,
14 may not disclose information obtained during a polygraph
15 test, except as provided in this section.

16 (b) PERMITTED DISCLOSURES.—A polygraph examiner,
17 polygraph trainee, or employee of a polygraph examiner
18 may disclose information acquired from a polygraph test
19 only to—

20 (1) the examinee or any other person specific-
21 ly designated in writing by the examinee;

22 (2) the employer that requested the test; or

23 (3) any person or governmental agency that re-
24 quested the test as authorized under subsection (a),
25 (b), or (c) of section 7 or any other person, as re-

1 quired by due process of law, who obtained a war-
2 rant to obtain such information in a court of compe-
3 tent jurisdiction.

4 (c) DISCLOSURE BY EMPLOYER.—An employer (other
5 than an employer covered under subsection (a), (b), or (c)
6 of section 7) for whom a polygraph test is conducted may
7 disclose information from the test only to a person de-
8 scribed in subsection (b).

9 SEC. 10. EFFECT ON OTHER LAW AND AGREEMENTS.

10 This Act shall not preempt any provision of any State
11 or local law, or any negotiated collective bargaining agree-
12 ment, that is more restrictive with respect to the adminis-
13 tration of lie detector tests than this Act.

14 SEC. 11. EFFECTIVE DATE.

15 (a) IN GENERAL.—Except as provided in subsection
16 (b), this Act shall become effective 6 months after the date
17 of enactment of this Act.

18 (b) REGULATIONS.—Not later than 120 days after the
19 date of enactment of this Act, the Secretary shall issue
20 such rules and regulations as may be necessary or appro-
21 priate to carry out this Act.